Follow the Evidence: Integrate Risk Assessment into Sentencing

JORDAN M. HYATT

Senior Research Coordinator, Jerry Lee Center of Criminology, University of Pennsylvania

Research Associate, Pennsylvania Commission on Sentencing*

MARK H. BERGSTROM

Executive Director, Pennsylvania Commission on Sentencing

Senior Lecturer, Crime, Law & Justice, The Pennsylvania State University

STEVEN L. CHANENSON

Associate Dean for Faculty Research and Professor of Law, Villanova University School of Law

Member, Pennsylvania Commission on Sentencing

Managing Editor, *Federal Sentencing Reporter*

The clamor for evidenced-based sentencing—from legal scholars and social scientists—has been increasing in recent years. At the same time, prison populations have grown and budget constraints have forced many jurisdictions to reconsider the allocation of fiscal and penal resources. Though some states have begun, and a few have experienced some success in, integrating actuarial risk assessment into their guideline instruments, newer, more powerful, and increasingly more accurate tools have advanced the capacity to predict offender risk. These approaches seek not to control judicial decision making, but rather to better inform judges about the potential outcomes of sentencing. The use of risk assessment at sentencing underscores an overall shift in the purposes of sentencing, moving from a backward-looking retributive approach with a focus on uniformity, proportionality, and reduction of unwarranted disparity to an approach that also incorporates a formalized, forward-looking utilitarian goal. As such, the United States Sentencing Commission should follow the lead of states such as Virginia, Missouri, and Pennsylvania and investigate the potential for integrating standardized, actuarial risk assessments into sentencing instruments and processes.

Risk prediction has long been understood, in criminal justice contexts, as the process of anticipating the future criminal behavior of an individual.[1] Generalized risk assessments have played a key role in setting the manner in which convicted offenders are supervised during community correctional sentences, treated while incarcerated, and, in a more informal and unguided sense, the manner and fluidity with which a defendant travels through the criminal justice system.[2] Significantly, standardized risk assessments offer the ability to identify, in a systematic manner, offenders who may, without decreasing public safety, be diverted to less severe—perhaps noncustodial—sanctions. Conversely, high-risk, dangerous offenders can be identified for consideration of more intensive supervision or, when those individuals may pose a significant danger to the community, to incapacitate them through incarceration. Of course, all of these assessments take place within the broad, existing legal and retributive boundaries.[3]

The introduction of standardized risk assessments into sentencing would hardly represent a sea change. With varying degrees of formality, judges already consider risk at sentencing. The judiciary thinks about, and is concerned with, the relative danger of recidivism for each offender sentenced. However, the information relied upon in reaching conclusions about recidivism risks comes from many sources, including the presentence reports, and is both not reliably available in all cases and not always reliable. Although factors such as the age of the offender, criminal record, prior incarceration, and social stability are often explicitly relied on as appropriate and individualized sentences are calculated,[4] they are employed without much consistency. In order to better use the predictive value of such information, as well as to ensure uniformity in its application, the nature and mechanics of risk assessment should become a standard part of sentencing procedure. This goal can be accomplished by integrating sophisticated risk-assessment tools into the routine application of sentencing guidelines.

Although often spoken of in generalized terms, risk predictions take on two distinct formats: clinical and actuarial assessments.[5] Categorically speaking, each method of assessment builds on radically different types of data. Actuarial assessments rely almost exclusively on static variables, which Faye Taxman describes as "the demographical or historical factors (past behaviors) that affect the trajectory of an individual."[6] These immutable variables include such characteristics as age at first arrest, gender, and criminal record. Clinical risk, though better able to capture aspects of treatment success, is difficult to quantify reliably because these factors are dynamic and will almost certainly change over time.

At sentencing, a discrete point in time, actuarial risk should dominate the factors considered within the sentencing guidelines. Dynamic risk factors should be employed in assessing the defendant's needs—another significant, but distinct, part of the sentencing process. Balancing these differing aspects of risk, the art and the science of sentencing, is essential to the decision-making process. In order to accomplish this balance, several states have integrated (or are in the process of integrating) risk into a variety of different sentencing systems. For example,

Federal Sentencing Reporter, Vol. 23, No. 4, pp. 266–268, ISSN 1053-9867 electronic ISSN 1533-8363.
 DOI: 10.1525/fsr.2011.23.4.266.

in Virginia, a state with a determinate sentencing structure, actuarial risk has been used to identify the lowest risk offenders since 2004. By identifying "25% of the lowest risk, incarceration-bound, drug and property offenders for placement in alternative (non-prison) sanctions, the state was able to, even after increasing the number of offenders targeted for noncustodial sanctions, decrease prison populations . . . without a significant increase in risk to public safety."[7] Risk assessments can, as in Virginia, be used to set the upper limit of the guidelines range in proportion with offenders' assessed risk based on the consideration of static factors.

In Missouri, a state with a largely indeterminate sentencing structure, actuarial risk is being considered through an automated risk assessment that takes into account offender-based variables, prior criminal history, and current offense details, as well as actual time served by similar offenders. Furthermore, clinical risk is considered through the Sentencing Assessment Report, which includes victim impact, offense history, and other, more dynamic information.[8] Pennsylvania, another largely indeterminate state, is taking a similar approach by starting to develop coordinated sentencing and parole guidelines, as well as exploring the requisite evidence for an independent offender risk score. Future plans also include the linking of risk to sentencing recommendations through structural changes to the guidelines and the development of a needs assessment procedure to ensure the presentence availability of information on dynamic factors, whenever appropriate.[9] The incorporation of risk assessments in both sets of guidelines will allow sentencing and parole authorities to discuss and understand factors known to be predictive of recidivism while still allowing for the consideration of dynamic risk and community needs.

Virginia, Missouri, and Pennsylvania all promulgate advisory guidelines. Like those in the federal system, these guidelines are designed to *guide* judges in the exercise of their discretion. The guidelines are not mandatory. The addition of actuarial risk assessments into the federal sentencing process, therefore, would be consistent with *Booker* and its progeny. Risk assessments could be employed by the court with the same purpose to inform and influence sentencing decisions as the larger guidelines system; they are not meant to undermine the procedure or substance of the sentencing process.

Recent advances in the science and statistical methodologies of prediction have allowed higher degrees of automation for actuarial risk forecasting than ever before. For example, techniques such as random forest modeling are currently being used to predict murder and violent crime with increasing accuracy and sophistication.[10] The output of such models has already been operationalized in a community corrections setting, allowing for risk forecasts to be generated for each new probation case in a large, urban jurisdiction.[11] If the data (*i.e.*, static risk factors) required to make the predictions are available at the time of sentencing, a similar system of automatic risk prediction could be standardized and made available to sentencing decision makers.

By introducing standardized risk assessment into sentencing procedures, the Commission could effectuate a shift from a purely desert-based to a more predictive-based guidelines system.[12] This change would represent a shift in emphasis from uniformity toward crime control, and would permit the crafting of sentences that may be "facially disparate, but are individualized and fair," based on variation in circumstance and context.[13] As Michael Tonry has noted, the "determination of exactly how much punishment an offender deserves is impossible."[14] However, an accurate assessment of risk provides the guidance necessary to craft sentences that meet the ideological goals of sentencing while still delivering a sanction that most appropriately reduces the threat of reoffending.

Indeed, the consideration of individualized risk at sentencing does not mean abandoning the drive for equality and fairness in sentencing. Like the current, often crude and erratic use of risk by many sentencing judges, actuarial risk assessments will be just one part of a complex sentencing system in which the judges and legislators maintain ultimate control. Sentencing will remain "a battle between art and science."[15] Ultimately, actuarial risk assessments cannot—and should not—supplant the discretion of the judge or the dynamic factors captured in presentence reports. However, they can provide concise, standardized, and uniform assessments of the likelihood that an offender will commit future crimes. This information will allow for the most appropriate sanction to be developed in each case, including the regular application of diversionary programs for offenders most likely to benefit from them and the meting out of severe sanctions when necessary to protect public safety.

The careful use of risk assessment is more than the future of sentencing. In a growing number of jurisdictions, it has become an exciting and integral part of current sentencing practices. Although progress has been and continues to be made in developing and testing actuarial risk assessment, much remains to be learned. With the promise of prison diversion for low-risk individuals and the incapacitation of those who pose the most risk to the community, integrating risk assessment into sentencing guidelines holds much promise. This approach offers the opportunity to standardize the offender-based factors considered at sentencing, which itself will be an improvement over the ad hoc assessments of risk on which many judges rely today. The United States Sentencing Commission should learn from current state experiments—both the successes and the failures—and help the federal guidelines follow the evidence toward integrating risk assessment and sentencing.

Notes

* The views expressed in this article are not necessarily those of the Pennsylvania Commission on Sentencing, or its other members or staff.

[1] Don M. Gottfredson, *Prediction and Classification In Criminal Justice Decision Making*, 9 CRIME & JUST. 1 (1987).

[2] Edward J. Latessa, *Best Practices of Classification and Assessment*, 13 J. COMMUNITY CORRECTIONS 4–6, 27–30 (2003).

[3] *See, e.g.*, Steven L. Chanenson, *Prosecutors and Evidence-based Sentencing: Risks, Rewards and Responsibilities*, 1 CHAP. J. CRIM. JUST. 28, 29, n.6 (2009) ("The key to evidence-based sentencing for our limited purposes is the principled use of reliable social science evidence in order to achieve judicial sentencing determinations that are more likely to improve public safety. While there are many other vital sentencing concerns and considerations in the real world, such as reducing unwarranted disparities and honoring retributive limits, this piece focuses on using information derived from scientific investigations and experiments."); *cf.* Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT. REP. 76, 78 n.15 (2003) ("But in the vast majority of cases, responsibly pursuing the response that is most likely to prevent recidivism will also serve any interest in denunciation and any conceivable impact in the nature of 'general deterrence'—assuming arguendo that the strategy of general deterrence has any viability.").

[4] Mark H. Bergstrom & Richard Kern, *A View from the Field: Practitioners' Response to Actuarial Sentencing: An "Unsettled" Proposition*, CRIMINOLOGY PUB. POL'Y (forthcoming 2011).

[5] Steven Gottfredson & Laura Moriarty, *Statistical Risk Assessment: Old Problems And New Applications*, 52 CRIME & DELINQ. 178–200 (2006).

[6] Faye Taxman, *Assessment with a Flair: Offender Accountability in Supervision Plans*, 70 FED. PROBATION 2 (2006).

[7] Richard Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT. REP. 3, 165–69 (2004).

[8] MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING: BIENNIAL REPORT 2007, http://www.mosac.mo.gov/file/MOSAC%20Commission%20Report%202007%20Final.pdf.

[9] Mark H. Bergstrom & Joseph Sabino Mistick, *Danger and Opportunity: Making Public Safety Job One in Pennsylvania's Indeterminate Sentencing System*, 12 JUST. RES. POL. 1 (2010).

[10] Richard Berk et al., *Forecasting Murder Within a Population of Probationers and Parolees: A High Stakes Application of Statistical Learning*, 172 J. ROYAL STAT. SOC'Y 1 (2009).

[11] Geoffrey C. Barnes et al., *Low-Intensity Community Supervision for Low-Risk Offenders: A Randomized, Controlled Trial*, 6 J. EXPERIMENTAL CRIMINOLOGY 159, 189 (2010).

[12] Andrew von Hirsch, *Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationales*, 74 J. CRIM. L. CRIMINOLOGY, 209–48 (1983).

[13] MARK H. BERGSTROM & JOSEPH SABINO MISTICK, DANGER AND OPPORTUNITY: MAKING PUBLIC SAFETY JOB ONE IN PENNSYLVANIA'S INDETERMINATE SENTENCING SYSTEM (2010).

[14] MICHAEL TONRY, LOOKING BACK TO SEE THE FUTURE OF PUNISHMENT IN AMERICA (2007).

[15] Joseph Sabino Mistick, *Man's Rules vs. God's Rules*, PITTSBURGH TRIB.–REV., Aug. 9, 2009, http://www.pittsburghlive.com/x/pittsburghtrib/opinion/s_637318.html.